SUPREME COURT, U. S.

No. 413

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In The Supreme Court of The United States

OCTOBER TERM, 1967

GORDON A. ROGERS,

Petitioner,

vs.

ROBERT J. ZINGHEIM,

Respondent.

BRIEF IN OPPOSITION TO
GRANTING OF PETITION FOR CERTIORARI

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JURISDICTION

It is respectfully submitted that the petition of GORDON A. ROGERS for a Writ of Certiorari to review the judgment of the District Court of Appeal, Fourth Appellate District, State of California, Division I, entered on March 22, 1967 should be denied.

The opinion of that court did not touch upon nor decide any question arising under the Federal Constitution

in that there has been no violation of due process at any stage of the proceedings and the issue of comity is of no merit and improperly raised.

STATEMENT

On November 24, 1958, respondent by written agreement, sold radio station XEMO located in Tijuana, Mexico, together with its physical facilities and a radio time sales agency located in San Diego, California, to petitioner Rogers. Rogers' agent, Robert S. Marshall, actually executed the contract, but it was understood by all parties that Rogers, who was present at the execution, was the disclosed principal and real party in interest. At the same time a Mexican citizen, one Ferreira, in whose name the license was held, executed a separate document by which he agreed to transfer the license to Marshall's nominee upon demand.

Subsequently, in 1959, the physical assets, agency and accounts receivable of Radio Station XEMO were transferred to a California corporation, Radio 860, Inc. In 1960 the building and physical facilities of the station were destroyed by fire. In 1961 the station resumed operation at a new location. Because of Rogers' failure to make payments in accordance with the original contract, a series of actions were filed and the instant consolidated appeals are taken from two of these cases, No. 275082, Zingheim v. Rogers, and No. 262878, Zingheim v. Marshall and Rogers, which were consolidated for trial.

Ferreira remained as the only licensee of XEMO

until his death on March 23, 1964, and no demand was ever made upon him for transfer of the license.

Case No. 275082 was filed against appellant Rogers in Municipal Court, to recover the amount of a judgment that had been rendered in an earlier action No. 240878 against Marshall, based upon Rogers' position as a disclosed principal and surety for Marshall. In that action the court found that Rogers was bound by the findings of fact, conclusions of lawand judgment in action No. 240878. Since, however, that judgment was for the amount of $3600 only, the amount of payments due at the inception of action No. 240878, a subsequent action No. 262878 for the entire contract balance was instituted on March 26, 1962. A judgment was rendered in that action in the amount of $29,689.04, for $3600, and for the unpaid balance of the purchase price against both Rogers and Marshall and attorneys' fees were awarded in the amount of $9896.

Judgments in favor of plaintiff and respondent herein were appealed to the Court of Appeal of the State of California, Fourth Appellate District, Division One, on March 27, 1967. (Fourth Civil Nos. 8151 and 8152). The Appellate court affirmed the judgment of the trial court except as to the amount of attorneys' fees awarded below. The amount of attorneys' fees were subsequently stipulated to between the parties at $5000.

A petition for hearing, addressed to the Supreme Court of the State of California was denied without hearing on April 24, 1967.

Petitioner mistakenly asserts that illegality of the

contract under Mexican law was rejected by the court in action No. 240878 "without comment." Judge Monroe, in that action, stated:

> "The allegation is based upon the theory that the agreement is invalid and unenforceable under the laws of Mexico. This contention appears to be without merit. It is true that the laws provide that the holder of the license to operate the radio station in Mexico must be a Mexican corporation or a Mexican citizen. This is customarily met by providing for appointees designated to hold such license or to hold title to the property. This was thoroughly understood by the parties at the time and reference thereto appears in the contract itself."

This decision was upheld in all subsequent actions.

ARGUMENT

The thrust of petitioner's argument is that under the conflict of laws doctrine Mexican law should govern as to the legality of the contract; that because of comity between nations the courts should recognize that illegality, and that the application of the principle of res judicata as to the issue of illegality resulted in a denial of due process to him.

In action No. 275082 it was stipulated between the parties that in earlier action No. 240878, against Marshall alone, petitioner Rogers supplied counsel, had a

proprietary interest in the outcome, and was the disclosed principal for his agent, Marshall, at the time the contract was executed on November 24, 1958. It is a matter of record that Rogers appeared as a witness in Action no. 240878, and that he guaranteed payments under the contract.

In light of these facts the court, in action No. 275082, held that findings of fact, conclusions of law, and the judgment in action No. 240878 were res judicata as to petitioner Rogers. This decision, affirmed on appeal, follows the logical rationale that a party with a proprietary interest in an action, who is duly notified and appears, who supplies counsel and controls that action, should be estopped to deny its res judicata effect as to himself on the sole basis of his voluntary choice not to intervene as a party. Under these circumstances the application of the doctrine of res judicata is not, and cannot be, violative of due process.

> "One who has voluntarily appeared in a case and actively conducted the defense cannot be held to have been denied by the courts of the state of the right to make a defense which was never presented."
>
> Louisville etc. R. Co. v. Schmidt, 20 S. Ct. 620

> "The essential element of due process are notice and opportunity to defend. In determining whether such rights have been denied, the courts are governed by the substance of things and not by mere form."

Siman v. Craft, 21 S. Ct. 836

For this reason the doctrine of res judicata was properly applied as to petitioner. However, petitioner is estopped, by his own actions, to raise the defense.

Petitioner owned and operated the station, retaining profits and title, for two years before his failure to make the payments provided in the contract resulted in the series of court actions. Four years after the inception of the original action, No. 240878, he still claimed ownership. He did not, and at this date still has not, offered to return to respondent, the station, or any portion of it, or the profits which he still retains. Despite that he seeks rescission of the contract.

> "One may not retain the benefits of a contract, and at the same time reject its burdens."
>
> Lyle v. McKendrick,
> 204 Fed. Rep. 2d 609, 612

> "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."
>
> Swain v. Seamens,
> 76 U.S. Reports 254, 274

"A waiver of all right to question the validity of a contract may be founded upon the claiming and acceptance of a benefit under it after full knowledge of all the facts."

Baker v. Cummings, 21 SC 578 at 583

It is clear that application of the doctrine of res judicata as to the petitioner did not result in a denial of due process.

Petitioner mistakenly asserts that both the California Court of Appeal and the trial court took judicial notice that the contract was contrary to Mexican law. The opinion of the California Court of Appeal states:

"In their brief on appeal, defendants have presented the opinion of a scholar learned in the laws of Mexico that the purchase of all the rights, title and interest, or a part thereof, by an American citizen of a Mexican commercial radio station was not legal under the Mexican law as it was in force in November 1958.

"This court takes judicial notice of the fact that Mexican law also forbids the ownership by a non-Mexican national of land within certain distances from the land or maritime borders of that country; also that in practice Mexican law has permitted title to land within the prohibited zone to be held by a Mexican trustee in trust for the benefit of a non-Mexican national for limited

periods of time.

"We mention the last point not with any pretense of making a redetermination of whether the November 24, contract was legal under Mexican law, but rather to suggest the possibility that the trial court in action #240878 may have taken judicial notice or had other evidence of such permitted practices."

The essence of the contract was the transfer of the license to a Mexican nominee to be named by Marshall. It has never been contended by respondent that transfer to an American licensee would not have been violative of Mexican licensing laws. Petitioner made a thorough study of this problem, consulting his own "expert", one Ashley Robeson, prior to executing the contract. If it was his subjective intent to violate the Mexican licensing regulation by appointing an American nominee, rather than a Mexican as the contract anticipated, he did not reveal this for some two and one-half years, and then only as a defense to enforcement of the contract.

The contract itself provides that it is to be governed by California law and if any portion is violative of Mexican law that portion only shall be void and the rest of the contract remain in full force and effect.

"6. The parties agree that the Superior Court of the State of California shall be the sole and exclusive forum for the trial of any issues or matters or causes of action which may arise to any party

> hereto because of this contract. However, if any part of this agreement is contrary to the laws of the Republic of Mexico, then such part is void and of no effect, but the balance of this contract is to remain in full force and effect."

For this reason the intent of the contracting parties and their principals should prevail and the judgments of the California courts upheld. The contract was not illegal at inception and only the illegal acts of petitioner himself could have violated the Mexican law.

> "The nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it was made, unless the parties at the time of making it, have some other law in view."
>
> Coughlan v. South Carolina R. Co.
> 12 SC 150, 152

> "When two parties enter into a contract, and make it determinable by the law of another state, it is conclusively presumed that each of them knows the law in respect to which they make the contract."
>
> Mutual Life Ins. Co. v. Phinney
> 20 SC 906, 911

The doctrine of conflicts of law is not properly raised since the intent of the parties, as to governing

law, controls. Furthermore, this issue was raised for the first time in petitioner's Petition for a Writ of Certiorari addressed to this Court and is violative of Supreme Court Rule 23 (1) (F) in that it does not state this.

> "Rule 23 (1) (F). If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge any exceptions, by assignment of error); and the way in which they were passed upon by the court; and with such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears (e. g., ruling or exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.
>
> "Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented. "

"Rule 23 (i): There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented."

"The litigant must follow the state procedures in raising the federal question."

In re Lamkin, 355 U.S. 52

Ferguson 365 U.S. 570, 572

The closely related issue of comity between the nations was raised for the first time in the Petition for Hearing addressed to the Supreme Court of the State of California and should be denied for that reason.

"Where the Federal constitutional issue was not raised in the trial court, as required by state law, but was raised for the first time in a petition for rehearing addressed to the state intermediated court, the highest state court's action in refusing without opinion to hear the case precludes review on certiorari by the Supreme Court."

Stembridge 343 U.S. 541, 547

"The Supreme Court will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved and perhaps wrongly decided."

Berea College 211 U.S. 45, 53

Fox Film 296 U.S. 207

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

KIMBALL, JONES, KELLY & McCARTY

Counsel for Respondent.